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SPROUT RETAIL, INC.,	**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**
Plaintiff,	
v.	**C.A. No. 3:17-cv-00135-PGS-DEA**
USCONNECT LLC,	
Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT USCONNECT LLC'S MOTION TO DISMISS PLAINTIFF SPROUT RETAIL, INC'S AMENDED SECOND-FILED COMPLAINT OR IN THE ALTERNATIVE TO STAY THIS ACTION

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I. INTRODUCTION

This is a duplicative lawsuit that was filed so that the Plaintiff could try to change the venue of the parties' ongoing dispute, which is currently the subject of a first-filed lawsuit in North Carolina ("NC Action"). Given the overwhelming overlap between this action and the NC Action, there can be no real dispute that the instant case was filed as a forum shopping scheme. The details underlying both lawsuits are identical -- including the parties, the relevant underlying facts, and the contract at issue. Moreover, the claims raised in this action constitute compulsory counterclaims in the first-filed NC Action. The two lawsuits are basically mirror images of one another, and therefore defendant USConnect, LLC ("USConnect") respectfully requests that this action be dismissed, or alternatively be stayed, so that the parties' disputes can be efficiently adjudicated in the first-filed case.

USConnect is a North Carolina company that operates a next-generation cashless payment system and loyalty program for vending machines. Sprout Retail, Inc. ("Sprout") is a company that USConnect hired to help build the technological service components for USConnect's network. The core of the parties' dispute centers around a certain Sprout Service and License Agreement dated April 1, 2013 ("Service Agreement"), which is governed by North Carolina law. Ex. C, at 12.[1] The Service Agreement is discussed extensively in the Complaints in both actions. Ex. A, ¶¶ 16-26; ECF No. 1, ¶¶ 7-21. Moreover, the claims raised in both actions are substantially the same and center around three issues. The first issue is breach of contract. In the NC Action, USConnect contends that it has met all of its obligations under the Service Agreement, including all obligations to pay for Sprout's services, but that Sprout has breached various provisions of the Service Agreement. Ex. A, ¶¶ 18; 43-48. In contrast, Sprout contends

[1] All of the Exhibits cited herein are attached to this memorandum of law for the Court's convenience.

in this action that it has met all of its obligations under the Service Agreement and it is USConnect that has breached the contract. ECF No. 1, ¶¶. 30-41, 47. The second issue involves alleged intellectual property. USConnect contends in the NC Action that Sprout's claims to various forms of intellectual property are not valid, and in any event USConnect has not in any way misused any of Sprout's intellectual property ("IP"). Ex. A, ¶¶ 19-42. Conversely, Sprout claims the exact opposite in the present action – that Sprout holds various forms of valid IP, and that USConnect has allegedly misused this IP. ECF No. 1, ¶¶ 10-11, 32, 35-36, 38. The third issue involves trade secrets. In the NC Action, USConnect alleges that Sprout has misappropriated various trade secrets. Ex. A, ¶¶ 29-31, 49-54. In contrast, in the present action Sprout alleges that it is USConnect that has engaged in the misappropriation of trade secrets. ECF No. 1, ¶¶ 17, 38. As the foregoing reflects, all of Sprout's claims in the present action constitute compulsory counterclaims in the NC Action because they arise "out of the transaction or occurrence that is the subject matter of" the first-filed NC Action. FED. R. CIV. P. 13(a).

The proceedings in the NC Action are substantially more advanced than in the present case. In particular, USConnect has filed a detailed motion for a preliminary injunction in North Carolina. *See* **Ex. E** hereto. Both parties in the NC Action have also served discovery on the other party. *See* **Ex. F** hereto. Pursuant to a preliminary order from the North Carolina Business Court, the parties are also negotiating a case management schedule and discovery plan in the NC Action. In contrast, there have been no proceedings in the present action beyond the filing of the Complaint and USConnect's motion to dismiss.

In summary, USConnect moves to dismiss this case without prejudice to Sprout to asserting its claims in North Carolina, or alternatively to stay this case pending a final adjudication of the claims in the NC Action, on the following three separate and independent grounds:

1. Under the first-filed rule, the NC Action is entitled to preference as the first filed lawsuit between the parties addressing the various disputes that have arisen from their performance of their duties under the Service Agreement. This duplicative action was improperly filed four days after the NC Action, and it reflects nothing more than a blatant attempt at forum shopping. Under the first-filed rule, the present case should either be dismissed without prejudice or stayed pending the determination of the claims in the NC Action.

2. Sprout's claims against USConnect in the NJ Action are all compulsory counterclaims in the NC Action, because they concern the exact same subject matter as USConnect's complaint – namely, the parties' Service Agreement on which both actions rely, as well as the same issues involving the parties' computer software and internet technology. Accordingly, all of Sprout's claims in the NJ Action are compulsory counterclaims that Sprout is required to assert in the NC Action, and if not asserted in that action are then subject to dismissal with prejudice.

3. Sprout's claims in this case must also be dismissed for lack of personal jurisdiction. While Sprout is clearly subject to personal jurisdiction in North Carolina,[2] USConnect is not subject to personal jurisdiction in New Jersey. All of the services that USConnect provides to various industry partners are conducted in and from North Carolina. Accordingly, USConnect has no meaningful presence in, nor sufficient minimum contacts with, the state of New Jersey to support the imposition of personal jurisdiction.

[2] As set forth herein, Sprout contracted with a North Carolina company (USConnect) to provide services to a North Carolina company (USConnect) and the parties' contract is governed by North Carolina law. Ex. C, at 12. Furthermore, Sprout's breaches involve misappropriation of trade secrets in North Carolina and solicitation of USConnect's North Carolina customers in violation of North Carolina law. Sprout's principal, Jim English, has traveled regularly to North Carolina in connection with these acts, including Sprout's services to USConnect. Ex. D, Decl. of J. Whitacre, ¶¶ 17-18.

II. PROCEDURAL HISTORY

On January 4, 2017, USConnect sued Sprout in North Carolina for claims arising from the parties' relationship under the Service Agreement. *See* ECF No. 6-5. Four days later, Sprout filed this retaliatory action in this Court, asserting competing but mirror-image claims against USConnect. ECF No. 1. A week later, based on Sprout's failure to accede to USConnect' demands and Sprouts escalating harmful conduct, USConnect filed a motion for preliminary injunction in the NC Action. ECF No. 6-9. On January 30, 2017, USConnect filed its motion to dismiss the NJ Action, ECF No. 6, and on February 1, 2017, in a tacit but unambiguous admission that the jurisdictional allegations of its Complaint were indeed flawed, Sprout filed a limited amendment to its Complaint, ECF No. 7, in order to make additional allegation regarding USConnect's alleged contacts with New Jersey and thus attempt to establish general jurisdiction over Defendant. USConnect respectfully renews its previous motion to dismiss in light of Sprout's filing of an amended complaint.

III. STATEMENT OF FACTS

A. *USConnect's Business and Service Agreement with Sprout*

USConnect, based in Greensboro, North Carolina, is a market-leading technology service provider for the vending and food service industry. USConnect has created a next-generation cashless-payment system and loyalty program for vending machines that provides exceptional value and efficiencies for employers and their employees, commercial landlords and their tenants, and for food service vendors. Ex. B, Aff. of J. Whitacre, ¶ 3.[3] Over the last three years, USConnect has amassed a large national network of food service and vending machine operators (USConnect's "Vendors"). These Vendors operate vending machines, micro markets, unmanned

[3] A true and correct copy of the Affidavit of Jeffrey S. Whitacre in support of USConnect's motion for preliminary injunction, dated January 13, 2017, is filed contemporaneously herewith as Exhibit B.

kiosks, cafeteria cash registers, and other remote food service devices ("Terminals"). *Id*. USConnect is the technological and customer service hub of this program, providing the networked cashless payment systems, mobile telemetry, account services and loyalty card programs that allow USConnect's Vendors to offer food services and USConnect's loyalty program to consumers on a nationwide basis. Ex. B, Aff. of J. Whitacre, ¶ 4.

Sprout has been involved in USConnect's internal operations for many years. In 2013, USConnect hired Sprout's principal, Jim English and his company Sprout Retail Inc., to help build the technological service components for the USConnect network. Ex. B, Aff. of J. Whitacre, ¶¶ 5-6. The parties executed the Service Agreement on April 1, 2013, so that Sprout could develop and administer certain technological back-end computer and software services for USConnect's nationwide cashless payment system and network of terminals. Ex. B, Aff. of J. Whitacre, ¶ 7. Working for USConnect, Sprout developed several components of the initial USConnect Network, including the account services, payment gateway, and customer support server functions and protocols necessary to support USConnect's nationally-networked cashless payment system model. This collective software system was referred to in the Service Agreement as the "Sprout System." Ex. B, Aff. of J. Whitacre, ¶ 6.

The Service Agreement required that Sprout build the Sprout System specifically for USConnect's exclusive use, and that Sprout's efforts and services were and would remain confidential. Ex. B, Aff. of J. Whitacre, ¶ 8. Specifically, the language of the Service Agreement requires that "Sprout shall not form, participate in or provide services to a similar competing organization to [USConnect and its Affiliates]." Ex. C, at. 4 In addition, the Service Agreement by its terms imposes certain obligations on Sprout related to non-disclosure and non-use of USConnect's confidential business information and trade secrets. Ex. C, at 9-10. In connection with the engagement of Sprout under the Service Agreement, Sprout gained complete and confidential access to highly proprietary information and trade secrets of USConnect. Ex. B, Aff. of J. Whitacre, ¶ 9. In addition, Sprout's position as an exclusive service provider, engaged to build the underlying suite of technical services upon which USConnect's business was based, put Sprout in a unique position of special trust and confidence relative to the business of USConnect. Ex. B, Aff. of J. Whitacre, ¶ 10. Not only did Sprout have access to key technological information regarding the underlying requirements of the suite of services offered by USConnect, but Sprout gained access to highly confidential strategic business information. Sprout was invited to participate and became a member of USConnect's board of advisors.

In 2016, the parties agreed that USConnect would transition many of the services provided by the Sprout System to new service providers. To facilitate the transition, the parties also executed a letter agreement dated March 26, 2016, affirming and expressly extending the continued effect of the Service Agreement until the parties completed their negotiation and execution of a proposed new agreement. Ex. B, Aff. of J. Whitacre, ¶¶ 12-13; Exhibit C hereto. *See also* ECF No. 1, Compl. ¶ 20. The parties were unable to complete their negotiations of a proposed new agreement because Sprout failed to respond in any respect to the last set of revisions to a proposed new agreement that were requested by USConnect during the parties' negotiations. The parties have thus been unable to reach agreement on the terms of a new agreement, and by execution of the Letter Agreement have expressly continued to operate under the earlier Service Agreement which remains in full force and effect. Aff. of J. Whitacre, ¶ 14.

B. *The North Carolina Action*

Unfortunately, Sprout has violated the exclusivity provisions of the Service Agreement, has misused USConnect's confidential information and trade secrets, including for the purposes of soliciting USConnect's customers. Sprout has also threatened to interrupt USConnect's business and supplier efforts based on wrongful claims of exclusive intellectual property ownership related to the Sprout System. Based on Sprout's breaches of the Service Agreement, Sprout's misappropriation of USConnect's trade secrets and confidential information, and Sprout's unfounded claims of intellectual property ownership, USConnect filed a lawsuit in North Carolina Superior Court to address Sprout's misfeasance. Because USConnect continued to rely on Sprout's payment gateway services, USConnect did not terminate its agreement with Sprout. Rather, USConnect sought only to address the substantial and ongoing harm which Sprout was causing.

In retaliation to the NC Action, Sprout took a number of malicious and harmful steps to interfere with USConnect's business and cause further harm, including the filing of this wasteful and duplicative action in New Jersey. Notably, however, Sprout's NJ Action acknowledges the validity of the Service Agreement and seeks financial compensation for primarily USConnect's alleged non-payment of certain invoices issued by Sprout between September 2016 and December 2016. In this manner, Sprout's retaliation operates as a concession that the NC Action, which has prior jurisdiction over the parties' dispute under the Service Agreement, is the proper forum for resolution of the parties' disputes.

C. *Sprout's Claims Against USConnect in this Action Substantially Mirror USConnect's Claims in the NC Action*

All of the claims asserted by Sprout in the NJ Action, and all of the fact issues alleged in the NJ Action, mirror the legal issues and fact issues asserted in the NC Action. Counts I, II, III and IV all involve claims arising from the alleged breach by USConnect of the Service Agreement between the parties, which is the same Service Agreement for which USConnect sued Sprout for breach of contract in the NC Action. These counts thus directly mirror corresponding claims of breach of the Service Agreement as alleged in the NC Action. Count V, VI and VII of the NJ Action similarly involve claims related to alleged misappropriation by USConnect of Sprout's personal property, including Sprout's alleged intellectual property and trade secrets and intellectual property, related to the parties' computer systems, loyalty cards and transaction processing, as alleged just as contemplated in Counts I and III of USConnect's complaint in the NC Action.

By way of summary and comparison, the similarity of the factual allegations and legal claims in the first-filed NC Action and the second-filed NJ Action is clearly illustrated in the chart below:

USConnect Complaint in First-Filed North Carolina Action	**Sprout Complaint in Second-Filed New Jersey Action**
USConnect has met all of its obligations under the Service Agreement. Ex. A, ¶ 18.	USConnect has not met many of its obligations under the Service Agreement. ECF No. 1, ¶¶ 34-37, 47.
USConnect has paid Sprout all amounts due under the Service Agreement. Ex. A, ¶ 18.	USConnect has not paid the amounts due to Sprout under the Service Agreement. ECF No. 1, ¶¶ 22-26.
The intellectual property claimed by Sprout has been publically disclosed. Ex. A, ¶¶ 19, 37.	Sprout's intellectual property rights are valid and enforceable. ECF No. 1, ¶¶. 10-11
Sprout has violated the confidentiality provisions of the Service Agreement. Ex. A, ¶ 27.	USConnect has violated the confidentiality provisions of the Service Agreement. ECF No. 1, ¶¶ 13-16, 33, 38.
Sprout has breached various provisions of the Service Agreement. Ex. A, ¶¶ 44-46	USConnect has breached various provisions of the Service Agreement. ECF No. 1, ¶¶ 30-41.
USConnect has not infringed or otherwise misused any of Sprout's intellectual property. Ex. A, ¶¶. 38-42	USConnect has duplicated and misused Sprout's intellectual property. ECF No. 1, ¶¶ 32, 35-36, 38.

Sprout misused USConnect's trade secrets. Ex. A, ¶¶. 29-31, 49-54	USConnect misused Sprout's trade secrets. ECF No. 1, ¶¶ 17, 38

D. *The Contract Asserted in This Action Is Already the Subject of Ongoing Proceedings in the North Carolina Business Court*

The claims arising under the parties' Service Agreement are already subject to ongoing proceedings in the NC Action. On January 13, 2016, in response to escalating business interference and malicious and disruptive acts by Sprout since the filing of the Complaint in the NC Action, including direct solicitation by Sprout of USConnect's customers, USConnect filed a motion for preliminary injunction in the NC Action. In connection with USConnect's motion for preliminary injunction, both parties in the NC Action have already served comprehensive written discovery requests on each other. Ex. F. This discovery entails many issues of the parties claims against one another and their relationship under the Service Agreement. *Id*. The parties are also working a case management report and discovery plan for the NC Action, including a briefing schedule for USConnect's motion for preliminary injunction. Because these critical and substantive issues were first raised and are currently pending in the NC Action, under the first-filed rule the NC Action should proceed in place of this case.

E. *Sprout's Complaint Concedes in its Complaint That This Case Is Intended to Resolve the Issues Asserted in the NC Action*

Sprout necessarily concedes by its Complaint in the NJ Action that the Service Agreement controls the rights and obligations of the parties. Indeed, as set forth above, this same Service Agreement is an exhibit to the complaint in the NC Action and the parties' relationship under this Service Agreement forms the basis for all of the claims asserted by USConnect in the NC Action Sprout's complaint excerpts provisions of the Service Agreement, and states that the Service Agreement is "valid and enforceable." ECF No. 1, ¶¶13-14. Sprout cites no other agreement between the parties, and all of Sprout's causes of action arise from the parties' relationship under the Service Agreement, which as Sprout's complaint indicates was "extended by mutual agreement" by a letter indicating that Sprout would "continue the licensed services." ECF No. 1, ¶¶ 19-20. Accordingly, Sprout's complaint in the NJ Action is an express concession that the NJ Action and the NC Action arise out of the "same transaction or occurrence" – namely, and exclusively, the parties' relationship under the Service Agreement. This is an admission by Sprout which demonstrates that there is no logical opposition to USConnect's motion to dismiss.

F. *The North Carolina Business Court is Specially Situated to Resolve the Claims Asserted in the NJ Action*

The North Carolina Business Court "is a specialized forum of the North Carolina State Courts' trial division [for cases] involving complex and significant issues of corporate and commercial law." *See* "About the Court" (www.ncbusinesscourt.net/new/aboutcourt/). The North Carolina Business Court was formed to establish "a substantial body of corporate law that provides predictability for business decision making [on the basis that] it is essential that corporations litigating complex business issues receive timely and well-reasoned written decisions from an expert judge." Rule 2.2 of the North Carolina General Rules of Practice. Pursuant to N.C. GEN. STAT. § 7A-45.4, any party may designate an action as a mandatory complex business case if it involves a material issue concerning, *inter alia*, intellectual property, trade secrets, the law governing corporations and limited liability companies, or certain contract disputes between business entities. N.C. GEN. STAT. § 7A-45.4(a) (2013).

Accordingly, based on the capabilities and focus of the North Carolina Business Court on disputes of precisely the sort arising in this case and in the NC Action, The North Carolina Business Court is specially situated to resolve and adjudicate the complex fact and technology issues of this case as well as the legal issues arising under North Carolina law. For this reason, dismissal of Sprout's complaint under either the first-filed rule or FED. R. CIV. P. 13 is appropriate, as the North Carolina Business Court is fully capable of resolving all issues related to the parties' dispute.

IV. ARGUMENT: THE COURT SHOULD DISMISS THE NJ ACTION OR ALTERNATIVELY STAY THIS ACTION PENDING RESOLUTION OF THE NORTH CAROLINA ACTION

A. *This Action Should be Dismissed Under the First-Filed Rule*

1. Overview and Application of the First-Filed Rule

The long-standing rule in this circuit is that "[t]he party who first brings a controversy into a court of competent jurisdiction for adjudication should, so far as our dual system permits, be free from the vexation of subsequent litigation over the same subject matter." *Chavez v. Dole Food Co.*, Inc., 836 F.3d 205, 216 (3d Cir. 2016) (quoting *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 930 (3d Cir. 1941)). Under the "first-filed rule," the court initially having the controversy before it should retain jurisdiction over the entire case and decide it. *See EEOC v. University of Pa.*, 850 F.2d 969, 971 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 182, 110 S. Ct. 577, 107 L.Ed.2d 571 (1990). "[I]t is the policy of our Circuit Court that absent unusual circumstances, the first-filed rule applies in cases of concurrent federal jurisdiction." *Berkshire Intern. Corp. v. Marquez,* 69 F.R.D. 583, 586 (E.D. Pa. 1976)); *see also GT Plus, Ltd. v. Ja-Ru, Inc.*, 41 F. Supp. 2d 421, 424 (S.D.N.Y. 1998) ("The first-filed rule 'embodies considerations of judicial administration and conservation of resources,' . . . and generally applies where two actions involve the same parties and embrace the same issues.")." "Adherence to the first-to-file rule is the rule and not the exception," and only certain extraordinary conditions will warrant consideration of a departure from the rule. *Crestron Elecs., Inc. v. Lutron Elecs. Co.*, No. 10-CV-

860 (DMC), 2010 WL 3035223, at *2 (D.N.J. Aug. 3, 2010).[4] The plaintiff in the later-filed action "bears the burden of showing that special circumstances should bar [the rule's] application." *Creston*, at *2.

Application of the first-filed rule by New Jersey courts routinely results in dismissal of a duplicative second-filed action. While some courts have made a distinction between a first-filed state court action and a first-filed federal district court action, the prevailing standard is that the First-Filed Rule should apply to co-pending parallel state and federal litigations "in the absence of compelling circumstances." *McGowan Builders, Inc. v. A. Zahner Co.*, 2014 U.S. Dist. LEXIS 46576 (D.N.J. Apr. 4, 2014) (applying first-filed rule to stay subsequent New Jersey action in favor of first-filed state court action in Missouri) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1173-74 (11th Cir.1982)).[5] Accordingly, application by New Jersey courts of the first-filed rule to bar subsequent, duplicative, and vexatious second-filed litigation, in favor of earlier-filed state court actions, is quite common. *See Oak Associates*,

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[4] None of the exceptions to application of the first-filed rule are present here. The *Creston* court observed those exceptions as follows: (1) rare or extraordinary circumstances; (2) inequitable conduct; (3) bad faith; (4) forum shopping; (5) where the later-filed action has developed further than the first-filed action; and (6) when the first filing party instituted suit in one forum in anticipation of the opposing party's imminent suit in another, less favorable, forum. Creston, at *2 (citing *Maximum Human Performance*, 2009 U.S. Dist. LEXIS 76994, at *8, 2009 WL 2778104). Determinations that "special circumstances" exist for a departure from the first-filed rule are indeed "rare." *See also Cephalon, Inc. v. Travelers Companies, Inc.*, 935 F.Supp.2d 609, 613 (S.D.N.Y. 2013) (noting that findings of special circumstances are "rare").As explained below, there are no special circumstances in this case which counsel in favor of a departure from the first-filed rule. Instead, the straightforward contract, IP and trademark disputes between the two parties, which center entirely around the Service Agreement and the related technology and business of USConnect, indicate that all factors favor the dismissal of this action in favor of the NC Action.

[5] The Third Circuit has not ruled on whether the first-filed rule applies when the first-filed action is in state court and some courts have reached differing conclusions. *Compare Morris Indus., Inc. v. Trident Steel Corp.*, Civ. No. 10-3462, 2010 U.S. Dist. LEXIS 132057, 2010 WL 5169007, at *3 (D.N.J. Dec. 14, 2010) with *Catlin Specialty Ins. Co. v. Plato Const. Corp.*, Civ. No. 10-5722, 2012 U.S. Dist. LEXIS 36494, 2012 WL 924850, at *4 (D.N.J. Mar. 19, 2012). Other circuits have determined clearly that the first-filed rule applies regardless of the jurisdiction of the first-filed action. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1174 (11th Cir.1982) ("the court initially seized of a controversy

Ltd. v. Palmer, No. 05-4210, 2006 U.S. Dist. LEXIS 4526, 2006 WL 293385, at *5 (E.D. Pa. Feb. 7, 2006) (enjoining Defendants from proceeding with their subsequently filed action); *Touzot v. ROM Dev. Corp.*, 2015 U.S. Dist. LEXIS 155357 (D.N.J. Nov. 16, 2015) (applying first-filed rule to enjoin defendant ROM from pursuing a second-filed Rhode Island action where plaintiff originally filed its declaratory judgment and breach of contract action in NJ state court); *Wheaton Indus., Inc. v. Aalto Sci., Ltd.*, 2013 U.S. Dist. LEXIS 118524 (D.N.J. Aug. 21, 2013) (applying first-filed rule to grant Motion to Dismiss in favor of parallel lawsuit filed in California state court prior to the date of the New Jersey action).

2. There is No Dispute that The NC Action is the First-Filed Action in This Dispute, and that the NC Action Fully Encompasses Sprout's Claims Against USConnect in the NJ Action

The NC Action was originally filed on January 4, 2017, and the complaint and civil summons was served on Sprout on the morning of January 5, 2017. The NC Action is therefore the first-filed action since the present lawsuit in New Jersey was not filed until January 8, 2017, and was served on USConnect on the afternoon of January 9, 2017. In any event, there is no factual support for the potential claim that the NJ Action was imminent at the time of the filing of the NC Action. Sprout had made no imminent demands or threatened legal action, and indeed Sprout had not contacted USConnect on these issues in months, including refusing to respond to USConnect's most recent contract proposals. It is clear that the filing of the NJ Action was not even contemplated until Sprout learned of USConnect's complaint, and was only done in retaliation to and as a direct result of USConnect's initiation of the NC Action.

As set forth above, the claims asserted in the NC Action encompass the exact same legal and factual issues underlying Sprout's claims in this action – namely, whether Sprout or

should be the one to decide the case. . . . It should make no difference whether the competing courts are

USConnect have breached the terms of the Service Agreement, whether Sprout or USConnect have misappropriated the other's trade secrets and confidential information, and whether Sprout owns IP rights in and exclusive control over the Sprout System or other IP, or whether USConnect can operate its business without threat of litigation from Sprout.

Sprout's filing of the instant action was merely a retaliatory act of forum shopping designed to try to avoid litigating all of these issues in the NC Action. The parties and claims in the two actions are a mirror image of the other, and both parties are indisputably subject to personal jurisdiction in North Carolina. None of the claims asserted by Sprout implicate any agreement other than the Service Agreement, which is controlled by North Carolina law, and Sprout raises no claims that implicate any aspect of federal law. Other than forum shopping, Sprout has no rational excuse for filing this duplicative lawsuit given that the issues and claims raised in the NJ Action were already a part of the NC Action.

While each claim affirmatively raised by Sprout in this action is not yet asserted in the NC Action,[6] nothing prohibits Sprout from litigating all of its claims in North Carolina. Indeed, as explained more fully below, all of the claims in the NJ Action are in fact compulsory counterclaims in the NC Action. Sprout thus possesses no argument that the NC Action cannot accord it complete relief on every claim asserted in this action. *See GT Plus.*, 41 F. Supp. 2d at 424 ("It is immaterial that the contractual dispute was not fully spelled out in [the first-filed plaintiff's] original Florida complaint; [the first-filed plaintiff's] suit was the first suit which made possible the presentation of all the issues and which, by amendment of the complaint did raise all the substantive issues between the parties.").

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both federal courts or a state and federal court with undisputed concurrent jurisdiction.").

Where an action involves complex questions of another state's laws, distant courts often favor the local forum's expertise with such issues. *See Landmark Fin. Corp. v. Fresenius Med. Care Holdings, Inc.*, 2010 U.S. Dist. LEXIS 18535 (D.N.J. Mar. 1, 2010) (transferring case on basis that "a local court [should] construe its own law.)" Because the Service Agreement is governed by North Carolina law, a North Carolina court is the most able forum under which to resolve the parties' contract disputes, including all of the issues raised in complaint in the NJ Action. Furthermore, USConnect's complaint raises claims – which would also be required to be asserted as counterclaims in the NJ Action if this duplicative litigation were permitted to proceed – that implicate complex questions of North Carolina law respecting covenants not to compete and misappropriation of trade secrets, and other issues. Thus, a North Carolina Court is best suited to resolve these complex issues, all of which are controlled by North Carolina law. Indeed, the North Carolina Business Court, where the NC Action is currently pending, is a special forum created precisely the resolution of complex business disputes involving trade secrets, intellectual property, and other similar issues. Thus, this consideration favors dismissal of the NJ Action or alternatively a stay of the NJ Action pending resolution of the NC Action.

In any event, dismissal pursuant to the first-filed rule does not require perfect identity between two concurrent cases. The interests of justice and judicial economy favor the parties concluding their litigation in the very court already familiar with both the parties and the factual and legal issues governing their disputes. The Third Circuit has spoken unequivocally on this issue: "The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice.…[P]ublic policy requires

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[6] Sprout's time to answer or otherwise respond to the NC Action does not arise until February 6, 2017, and so Sprout is not yet required to assert in the NC Action any of the claims, which are compulsory counterclaims in the NC Action, as described herein. N.C.R. Civ. P. 4(b).

us to seek actively to avoid the waste of judicial time and energy [caused by] duplicat[ing] each other's work in cases involving the same issues and the same parties." *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 930 (3d Cir. 1941).

Allowing pursuit of this duplicative lawsuit would substantially hinder judicial efficiency. Sprout seeks to force USConnect to bring its pending claims in the NC Action to this Court, as Sprout knows USConnect may have to bring these claims in this action to effectively defend itself. This puts USConnect in the *Catch-22* situation of potentially being forced to re-litigate claims already pending in the NC Action in order to defend this duplicative lawsuit. This would be contrary to the interests, of judicial economy, deny USConnect its choice of forum in the first-filed action, reward forum shopping, and improperly allow Sprout to bring claims in this action that were properly compulsory counterclaims in the NC Action. *See Integrated Fin. Assoc., Inc. v. Blanchard*, No. 2:10–cv–00986, 2010 WL 4736610, *2 (D. Nev. Nov. 15, 2010) ("Additionally, since the California Action was filed first, those proceedings have priority and Integrated's suit in this Court seems to be an attempt at forum shopping because each of Integrated's claims may be brought in California as counterclaims, even if they are not compulsory counterclaims. Integrated has simply chosen to make the matter more complicated by filing suit in Nevada."); *SW Indus., Inc. v. Aetna Cas. & Sur. Co.*, 653 F. Supp. 631, 636 (D.R.I. 1987) (finding plaintiff's selection of forum for "later-filed action" entitled to no weight where the plaintiff's claims would constitute compulsory counterclaims in the defendant's earlier-filed action.").

In light of the foregoing, Sprout's Complaint presents no grounds to overcome the strong presumption in favor of the forum of the first-filed suit. Based upon these facts, the Court's dismissal of the NJ Action is appropriate under the first-filed rule.

B. *The Claims in This Action Must be Dismissed Because They Can Only Be Lawfully Brought As Compulsory Counterclaims in the NC Action*

1. Sprout's Claims Must be Dismissed Because They are Compulsory Counterclaims in the NC Action

Sprout's claims against USConnect in the Complaint filed in the NJ Action all arise from the parties' relationship under the Service Agreement, which is already the subject of the NC Action. Sprout asserts that a) Sprout is entitled to payment under the Service Agreement and b) that Sprout is the exclusive owner of the Sprout System, and that USConnect has breached the Service Agreement by misappropriating Sprout's intellectual property, trade secrets and confidential information in a manner that causes harm to Sprout. ECF No. 1, ¶¶ 30-41. These claims, in turn, incorporate factual allegations regarding Sprout's contention regarding the Service Agreement and Sprout's claim to ownership of certain IP. *Id*. at ¶¶ 10-14. In fact, all of Sprout's claims constitute compulsory counterclaims which Sprout could only assert in the NC Action, because all of Sprout's claims arise from the "transaction or occurrence that is the subject of" the NC Action.

The policy underlying this rule is judicial economy." *Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.*, 292 F.3d 384, 389–90 (3d Cir. 2002). *See also* FED. R. CIV. P. 1 ("[The Federal Rules of Civil Procedure] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."); *Southern Construction Co. v. Pickard*, 371 U.S. 57, 60, 83 S.Ct. 108, 9 L.Ed.2d 31 (1962) (stating that the purpose of Rule 13(a) is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters"); *Aldens v. Packel*, 524 F.2d 38, 51 (3d Cir.1975) (describing "the fundamental policy underlying Rule 13" as "the expeditious resolution of all controversies growing out of the same transaction or occurrence or between the same parties in a single suit").

Rule 13 mandates that a "pleading must state as a counterclaim any claim that – at the time of its service – the pleader has against an opposing party if the claim: (A) arises out of the transaction of occurrence that is the subject of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction." FED. R. CIV. P. 13(a)(1). "A claim is compulsory if a *logical relationship* exists between the claim and the counterclaim and [if] the *essential facts of the claims are so logically connected* that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Critical-Vac Filtration Corp. v. Minuteman Intern., Inc.*, 233 F.3d 697, 699 (2d Cir. 2000) (emphasis in original).

"[T]here need not be precise identity of issues and facts" in order for a claim to qualify as a compulsory counterclaim; *Transamerica*, 292 F.3d at 389–90; rather, the relevant inquiry is whether the counterclaim "bears a logical relationship to an opposing party's claim." *Xerox Corp. v. SCM Corp.*, 576 F.2d 1057, 1059 (3d Cir.1978). The concept of a "logical relationship" is viewed liberally in order to promote judicial economy, and a "logical relationship" between claims exists where separate trials on each of the claims would "involve a substantial duplication of effort and time by the parties and the courts." *Transamerica*, 292 F.3d at 389–90. This "is likely to occur when claims involve the same factual issues, the same factual and legal issues, or are offshoots of the same basic controversy between the parties." *Id.*; *Great Lakes Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir.1961). In short, the objective of Rule 13(a) is to promote judicial economy, so the term "transaction or occurrence" is construed generously to further this purpose.

In this case, liberal or generous construction of the "transaction or occurrence" at issue is not required. The dispute between the parties is singular and focused, and consists of identical and mirror-image claims. Sprout's filing of this duplicative action, instead of filing its compulsory counterclaims in the pending NC Action, "contravenes the purpose of Rule 13" because that Rule was "designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." *Southern Const. Co. v. Pickard*, 371 U.S. 57, 60, 83 S.Ct. 108, 110 (1962)). All of the counts of Sprout's complaint in the NJ Action thus constitute compulsory counterclaims that Sprout was required to file, if at all, in response to USConnect's Complaint in the NC Action. As a result, this Court should dismiss all claims of the complaint in the NJ Action under FED. R. CIV. P 13.

2. The Adjudication of Contract Disputes In This Case Would Deprive USConnect The Right To Have its Claims, Including Its Motion For Preliminary Injunction, Determined in the NC Action Without Threat of Conflicting Rulings

Sprout's motivation for filing this action was almost certainly forum shopping, or worse. Sprout clearly did not like the fact that it had been sued in North Carolina, so it hired an attorney to file Sprout's own case in New Jersey at the same time that counsel was pursuing the possibility of settlement discussions in North Carolina. Shortly after Sprout's counsel responded to USConnect's invitation to discuss a negotiated resolution, Sprout's counsel prepared and filed this duplicative action in New Jersey.

As set forth in detail above, much of the subject matter of this action was already a component of the complaint filed in the NC Action. Moreover, the legal and fact issues raised by Sprout's second-filed complaint are also the subject of a motion currently pending in the North Carolina Business Court on the issue preliminary injunctive relief. Indeed, both of the parties in the NC Action have already served discovery on each other. Ex. F. Furthermore, the parties in the NC Action are outlining a proposed briefing schedule to coordinate the hearing of the preliminary injunction motion with the results of the pending discovery. It is well-settled that parties have a right to be heard on motions submitted to a court. *See* 60 C.J.S. MOTIONS AND ORDERS § 39 (2014).

Continuation of this duplicative case threatens to disrupt USConnect's right to have the issues of its motions decided in a singular forum. Failure of this Court to dismiss the NJ Action, pursuant to the instant Motion, would set the parties tumbling along parallel but potentially conflicting litigation paths, leading to a likelihood of competing and contradictory ruling on key legal and factual issues related to the parties' Service Agreement. Ultimately, having to litigate in two separate forums creates risk that USConnect will be denied an opportunity to have its claims heard without the threat of duplicative and potentially conflicting rulings in another forum to which USConnect is not subject to jurisdiction.

Sprout is simply shopping for a new court in which it has a chance to plead its case on new terms, without facing the pending motions and claims filed in North Carolina. One court described this type of strategy as follows: "[w]hen they see a storm brewing in the first court, then they try to weigh anchor and set sail for the hopefully more favorable waters of another district." *See Kidd v. Andrews*, 340 F.Supp. 2d 333, 336 (W.D.N.Y. 2004). Forum shopping is, however, an unquestionably improper litigation tactic. *See Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998) ("Judge-shopping clearly constitutes conduct which abuses the judicial process.").

C. *Sprout's Second-Filed Complaint Must Be Dismissed Because USConnect is Not Subject to Personal Jurisdiction in this District*

Sprout's filing of an amended complaint on February 1, 2017, ECF No. 7, is an clear admission that's Sprout's initial attempt to allege personal jurisdiction over USConnect was fatally flawed, and that USConnect is not subject to specific jurisdiction in New Jersey. In a shallow effort to correct the deficiencies of its initial pleading, Sprout now attempts to establish general jurisdiction over USConnect via its Amended Complaint in order to salvage this second-filed action from dismissal.

A court may exercise personal jurisdiction over a defendant only to the extent permitted by the Due Process Clause of the Fourteenth Amendment. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S. Ct. 2846, 2853, 180 L. Ed. 2d 796 (2011). The New Jersey long-arm statute permits courts to assert personal jurisdiction "to the fullest limits of due process." *IMO Indus. v. Kiekert AG*, 155 F.3d 254, 258-59 (3d Cir. 1998). While a plaintiff "need only establish a prima facie case of personal jurisdiction," *Miller Yacht Sales, Inc. v. Smit*h, 384 F.3d 93, 97 (3d Cir. 2004), as explained in USConnect's first Motion to Dismiss, there is little question that specific jurisdiction over USConnect is lacking here. In establishing specific jurisdiction, which only exists when the cause of action arises out of or relates to the defendant's activities in the forum, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984), the focus of the analysis is whether "the defendant has 'purposefully directed' his activities at residents of the forum" and "the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). In order to establish specific jurisdiction, one or more of Sprout's claims must therefore "arise out of or relate to" specific activities of USConnect that were "purposefully directed" to the State of New Jersey. *Id*. Even taking Sprout's allegations as true, all of USConnect's allegedly wrongful conduct, from which Sprout's purported claims "arise out of or relate to," occurred outside New Jersey.

Indeed, even Sprout's Amended Complaint fails to allege facts suggesting that USConnect's breach of contract arise out of or relate to USConnect's activities in New Jersey. *See Grace v. T.G.I. Fridays, Inc.*, 2016 U.S. Dist. LEXIS 32550, 8-9 (D.N.J. Mar. 14, 2016) (dismissing complaint on lack of personal jurisdiction). The Service Agreement itself requires that North Carolina law apply to the parties' relationship. Sprout's attempt to hijack the NC Action and move this dispute to New Jersey clearly does not "comport with traditional notions of fair play and substantial justice," because the face of Sprout's complaint bears no indication that USConnect committed any act in New Jersey that would give rise to any of Sprout's claims against it. *Burger King*, 471 U.S. 462, 472 (1985).

Sprout has not alleged any conduct or activity of USConnect which was directed at or occurred in the state of New Jersey that also gave rise to the claims it alleges against USConnect. Assuming *arguendo* that every allegation by Sprout is true, and that USConnect has breached the service agreement and misappropriated intellectual property, that alleged misconduct (which is disputed) would have occurred in North Carolina where USConnect does its business. There is no nexus between the use of equipment by vendors in New Jersey, regardless of whether those vendors subscribe the USConnect system, and the claims that Sprout has asserted against USConnect. Likewise, there is no nexus between the alleged misconduct which gives rise to Sprout's claims (e.g., USConnect's alleged failure to pay for services rendered under the Service Agreement) and Sprout's allegations of USConnect's contact with the state of New Jersey. This Court made clear in *DisplayWorks* that for a court to exercise specific personal jurisdiction, a defendant must not only direct at least some of its activities at the forum state, the litigation must also arise out of those activities. Sprout falls far short of pleading facts, even taken as true, which give this Court specific personal jurisdiction over USConnect.

Similarly, Sprout cannot invoke personal jurisdiction over USConnect solely on the basis of the services that Sprout provides to USConnect under the Service Agreement. Sprout fails to allege facts suggesting that USConnect's breach of contract arises out of or relate to

USConnect's activities in New Jersey. *See Grace*, 2016 U.S. Dist. LEXIS 32550, at 8-9. Indeed, the Service Agreement itself requires that North Carolina law apply to the parties' relationship. Sprout's attempt to hijack the NC Action and move this dispute to New Jersey clearly does not "comport with traditional notions of fair play and substantial justice," because the face of Sprout's complaint bears no indication that USConnect committed any act in New Jersey that would give rise to any of Sprout's claims against it. *Burger King*, 471 U.S. 462, 472 (1985).

Because Sprout must realize that it cannot establish specific personal jurisdiction, Sprout attempts by amendment to create additional contacts by USConnect with New Jersey in the hopes of building its case for general jurisdiction over USConnect. However, Sprout's attempts are misplaced. "For a corporate defendant, the main bases for general jurisdiction are (1) the place of incorporation; and (2) the principal place of business." *DisplayWorks, LLC v. Bartley*, 182 F. Supp. 3d 166, 173 (D.N.J. 2016). Aside from these examples, general jurisdiction only arises "where 'a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.'" *Id.* (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 n. 19 (2014)).

Neither USConnect's place of incorporation nor its principal place of business is in New Jersey. Ex. D, Decl. of J. Whitacre, ¶ 3. Furthermore, Sprout cannot show that USConnect's business in New Jersey is "so substantial and of such a nature as to render [it] at home" in New Jersey. *DisplayWorks*, 182 F. Supp. 3d at 173. USConnect is a North Carolina company that operates from a single office in Greensboro, North Carolina. Ex. D, Decl. of J. Whitacre, ¶ 3. USConnect has only eight (8) employees, all of whom are based at USConnect's office in Greensboro, North Carolina. *Id.*at ¶ 4. None of USConnect's employees have sales routes in

New Jersey or otherwise travel regularly to New Jersey in connection with USConnect's business. Ex. D, Decl. of J. Whitacre, ¶¶ 6-7.[7] Indeed, USConnect even has very few customers in New Jersey - of nearly a hundred vendors that use USConnect's platform, only two (2) of those affiliates have offices in New Jersey. Ex. D, Decl. of J. Whitacre, ¶ 16; *see also* ECF No. 1, ¶ 3. However, all of the services that USConnect provides to those affiliates are conducted from North Carolina, and USConnect is not subject to any contractual obligations construed under New Jersey law. Accordingly, USConnect has neither meaningful presence in nor sufficient minimum contacts with the state of New Jersey to support the imposition of general personal jurisdiction under any of the considerations laid out in *Goodyear* or *DisplayWorks*.

In its Amended Complaint, Sprout raises new allegations regarding the details of USConnect's two customers in New Jersey, as well as information regarding another company with locations in New Jersey, Heartland Payment Systems. First, as noted above, none of these non-party companies are involved in any way in the disputes or alleged wrongful acts asserted by Sprout, and thus do not give rise to specific jurisdiction. Thus, Sprout must be relying on these three companies' contacts with USConnect to establish general jurisdiction over USConnect.

The additional allegations of Sprout's Amended Complaint, even taken as true for the purpose of this Motion to Dismiss, are still insufficient to give this Court general personal jurisdiction over USConnect. Sprout attempts to conform USConnect's sale of cashless payment cards and related services to vendor operators, who in turn use those payment cards in New Jersey, as a basis of general personal jurisdiction. ECF No. 7, ¶ 3. As this Court has previously recognized in *Benitez*, the Supreme Court has made unambiguously clear that even an expectation that a company's goods would be sold to or used in a particular forum does not give rise to specific personal jurisdiction over that company. Such a tenuous connection could give rise to national personal jurisdiction not based on any action by a defendant. Contrary to Sprout's assertions, where the equipment which USConnect produces ends up through the actions of others does not and cannot give rise to specific personal jurisdiction.[8]

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[7] Any travel of USConnect's executives through New Jersey airports, including Newark and Teterboro, is merely incidental to interstate travel and business efforts targeting accounts in New York City. This does not constitute a deliberate effort by USConnect to engage in business conduct in New Jersey, nor does it constitute "purposeful availment" of New Jersey's laws and protections

Sprout continues many allegations of USConnect's "systematic and continuous" contacts with New Jersey through its Amended Complaint, but even taken as true, these limited contacts are not of the nature that are generally accepted as "systematic and continuous," and thus fail to establish general personal jurisdiction. Nothing Sprout alleges alters USConnect's place of incorporation or principal place of business. Additionally, even if its contacts with some of its customers are as regular and deliberate as Sprout claims—which is disputed—they fall far short of making New Jersey a place USConnect would "feel at home."

D. *Dismissal of the NJ Action Under the First-Filed Rule is Consistent with Abstention Doctrine*

In addition to application of the first-filed rule, a federal court may also consider federal abstention doctrine in deciding to dismiss or stay a pending federal court action in favor of a parallel state court proceeding. *See McGowan Builders, Inc. v. A. Zahner Co.*, 2014 U.S. Dist. LEXIS 46576 (D.N.J. Apr. 4, 2014) (noting that while "the first-filed rule traditionally applies between federal courts of equal rank rather than between concurrent matters in federal and state courts" application of the first-filed rule in favor of a competing state-court action is also appropriate where requirements for abstention are met). *See also Nationwide Mut. Fire Ins. Co.*

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[8] Sprout also claims the presence of USConnect-made goods in New Jersey constitutes "systematic and continuous contacts" so pervasive as to give rise to general personal jurisdiction. This assertion misapplies general versus specific personal jurisdiction, as discussed in the case law distinctions above. Suffice to say, the

v. George V. Hamilton, Inc., 571 F.3d 299, 307 (3d Cir. 2009) (citing *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)). Of course, as set forth above, this Court would only consider the abstention doctrine once it determines that personal jurisdiction over USConnect exists and the Rule 13 should not apply.

The threshold question in determining whether abstention is appropriate is whether there is a "parallel" state proceeding. *Yang v. Tsui*, 416 F.3d 199, 204 n.5 (3d Cir. 2005). Two proceedings are parallel "when they involve the same parties and substantially identical claims, raising nearly identical allegations and issues, and when plaintiffs in each forum seek the same remedies." *Golden Gate Nat. Senior Care, LLC v. Minich*, 629 Fed. Appx. 348, 2015 WL 6111426 at *2 (3d Cir. Oct. 16, 2015) (quoting *Yang*, 416 F.3d at 204 n. 5); *see also IFC Interconsult, AG v. Safeguard Int'l Partners, LLC.*, 438 F.3d 298, 306 (3d Cir. 2006) (the Third Circuit only requires "substantial identity of parties and claims."). In this case, there is little question that both proceedings are parallel, as both the NC Action and the NJ Action involve the exact same parties, the same Service Agreement, and the same types of legal claims related to the parties' contract, trade secret, and IP dispute.

In the case involving two parallel proceedings, a court applies a multi-part test to determine whether abstention applies, including analysis of: (1) "the inconvenience of the federal forum," (2) "the desirability of avoiding piecemeal litigation," (3) "the order in which jurisdiction was obtained," (4) "whether federal or state law controls," and (5) "whether the state court will adequately protect the interests of the parties." *Nationwide*, 571 F.3d at 308.[9]

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presence of the vending machines does not change USConnect's place of incorporation or principal place of business.

[9] Another factor, related to *in rem* jurisdiction, is not relevant here.

In this case, the abstention factors under the *Colorado River* doctrine closely track USConnect's arguments under the first-filed rule. While the first factor is neutral, USConnect's arguments raised herein regarding the first-filed rule and the application of Rule 13 counsel in favor of abstention to avoid piecemeal and duplicative litigation. Indeed, as to the third factor and considering the issues of jurisdiction raised herein, this Court likely need not even consider the abstention doctrine due to Sprout's failure to establish personal jurisdiction over USConnect. Most notably, under the fourth and fifth factors, it is well-established that North Carolina state law controls the parties' contract dispute, and the sophisticated capabilities of the North Carolina Business Court will more than adequately protect the interests of the parties. Thus, application of abstention doctrine to the Court's application of the first-filed rule does not disturb the propriety of dismissal as sought by USConnect. See *McGowan Builders*, 2014 U.S. Dist. LEXIS 46576 (applying first-filed rule and abstention doctrine to stay subsequent NJ action in favor of first-filed MO state court action).

E. *As an Alternative to Outright Dismissal, the Court Should Stay this Action in Favor of the North Carolina Action*

Courts sometimes conclude that in deciding a motion to dismiss under the first-filed rule, the presence of certain factors counsels in favor of a stay, in lieu of dismissal. *See Chavez*, 836 F.3d at 221. *See also* 6 WRIGHT, MILLER, *Fed. Prac. and Proc.* § 1418 (3d ed. 2014) ("Ideally, once a court becomes aware that an action on its docket involves a claim that should be a compulsory counterclaim in another pending federal suit, it will stay its own proceedings or will dismiss the claim with leave to plead it in the prior action."). USConnect contends here that it is not subject to personal jurisdiction in New Jersey, and that a stay of the NJ Action is thus improper where personal jurisdiction does not lie. Sprout's attempts at forum shopping also merit dismissal rather than stay of this action. Furthermore, Sprout raises no claims arising under federal law, and thus no aspect of Sprout's complaint particularly implicates the authority of this court as compared to the court in the NC Action.

Indeed, "courts have rejected the argument that the [first-filed] rule compels a district court to stay the second filed action without regard to the circumstances of the case. *One World Botanicals Ltd. v. Gulf Coast Nutritionals, Inc.*, 987 F. Supp. 317, 326 (D.N.J. 1997); *see also Tuff Torq Corp*. v. *Hydro–Gear Ltd*., 882 F. Supp. 359, 363 (D.Del.1994) (applying first-filed rule in patent infringement case). Ultimately, the decision to dismiss a subsequent suit under the first-filed rule rests within the discretion of the trial court. *One World*, 987 F. Supp. at 326.

Notwithstanding the foregoing, should the Court determine that USConnect is subject to personal jurisdiction in New Jersey and that dismissal of Sprout's complaint in the NJ Action would be improper for some extraordinary reason, then USConnect respectfully requests that the Court exercise its authority to stay the NJ Action under the first-filed rule pending full adjudication, including the resolution of any appeals, and the entry of final judgment in the NC Action which is pending in the North Carolina Business Court.

V. CONCLUSION

Based on the foregoing arguments and authorities, USConnect respectfully requests that the Court dismiss all counts in Sprout's Complaint against USConnect, or alternatively, stay this action pending full adjudication, including the resolution of any appeals, and the entry of final judgment in the NC Action which is pending in the North Carolina Business Court.

Dated: February 15, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2017, the foregoing Memorandum of Law in Support of USConnect LLC's Motion to Dismiss Plaintiff Sprout Retail, Inc's Amended Second-Filed Complaint Or In The Alternative To Stay This Action was electronically filed *via* the Court's CM/ECF system, which delivered a true and correct copy of the filed document on the party listed below:

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